NO. 90-330

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In the Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM M. WILCOX, JR.
Petitioner

VERSUS

TERRYTOWN FIFTH DISTRICT
VOLUNTEER FIRE DEPARTMENT, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. What qualifies a private corporation as a "public agency" as defined in Section 3(x) of the Fair Labor Standards Act, entitling it to avail itself of certain exemptions from overtime pay obligations.

2. Whether the Fifth Circuit has articulated a test for determining public sector status clearly at odds with the longstanding test adopted in *NLRB v. Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971) and closely related FLSA caselaw of other circuits.

3. What deference is to be afforded the Secretary of Labor in her enforcement of the Fair Labor Standards Act with regard to employing entities with mixed private and public characteristics.

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IN THE SUPREME COURT OF
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OCTOBER TERM, 1990

WILLIAM M. WILCOX, JR.
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VERSUS

TERRYTOWN FIFTH DISTRICT
VOLUNTEER FIRE DEPARTMENT, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *William M. Wilcox, Jr. v. Terrytown Fifth District Volunteer Fire Department, Inc.*, 897 F.2d 765 (5th Cir. 1990).

OPINIONS BELOW

The opinion of the United Court of Appeals for the Fifth Circuit is reported at 897 F.2d 765 and is reprinted at App. A, A-1. The per curiam rehearing denied is reprinted at App. B, A-8. The district court's unpublished reasons for judgment are reprinted at App. C, A-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 3, 1990. Following a timely petition for panel rehearing and suggestion of rehearing en banc, a per curiam order denying panel and en banc rehearing was entered on May 21, 1990. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION

Section 3(x) of the Fair Labor Standards Act, 29 U.S.C. §203(x), provides:

> (x) "Public agency" means the Government of the United States; the government of a State or political subdivision of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

STATEMENT OF THE CASE

William M. Wilcox, Jr. brought an action in district court seeking enforcement of the overtime provisions of the Fair Labor Standards Act (FLSA) with respect to his employment as a paid employee of the Terrytown Volunteer Fire Department, Inc. ("the corporation"). The trial judge granted a motion for summary judgment brought by the corporation, which contended that it was a 'public agency" exempt from the general overtime requirements of the FLSA. Wilcox timely appealed.

The Fifth Circuit construed Section 3(x) of the FLSA, which defines "public agency," to include a private

party that is "directly responsible to public officials or to the general public" and whose contracts with public entities "designate them as state agencies rather than independent contractors." A-5. It found that this corporation delivered a "traditional governmental function." A-6. It also found that the corporation was "funded almost exclusively by the proceeds of a millage tax imposed upon [Parish] residents and by allocation of certain State tax dollars." It reasoned that because the corporation was "accountable to [the Parish] for the way in which such money is spent and can use these funds only to provide fire protection and related services. . ." the corporation was tantamount to an "agency of a political subdivision." A-6.

Wilcox is one of nineteen paid full time employees of the corporation. The corporation was incorporated by private parties. Wilcox is an "operator" responsible for manning and driving the corporation's fire trucks and assisting volunteer firefighters at fire scenes. In 1985 the corporation instituted work week changes compensating paid operators, who work a 24-hours on, 48-hours off work cycle, for overtime hours, but only after working 212 hours in a 28 day cycle. The corporation acted under the belief that it was "public agency" exempt from the general FLSA overatime pay requirements. It availed itself of the limited overtime exemptions for fire protection activities of public employers found in Section 7(k) of the FLSA, 29 U.S.C. §207(k), and implementing Department of Labor regulations. *See* 29 C.F.R. §553.230.

The corporation contracts with the Parish of Jefferson (a political subdivision of Louisiana) for the delivery of fire protection services. The Parish does not employ Wilcox or his co-workers. Wilcox and his co-workers are not under Parish civil service. The corporation services an area of

Jefferson Parish designated as the Fire Protection District No. 5 for the Parish of Jefferson, a public corporation established pursuant to La.R.S. 40:1500.[1] The corporation's officers are not officers of either the Parish or the Fire Protection District. No public body or officer can remove the corporation's officers.

The corporation was *not* created by Jefferson Parish or any other public body.[2] The corporation's governance is unimpaired by the Parish and the District. Selection of volunteer "members" and hiring of paid operators are not subject to government control or popular approval. The paid operators are not covered by Louisiana firefighter minimum wage and retirement laws.

REASONS FOR GRANTING THE WRIT

The determination that the corporation qualifies as a public agency merits Supreme Court review because of the substantial effect which the lower court's decision will have upon the administration of the FLSA insofar as it sets requirements unique to governmental employers and their employees. The effect of this decision would be to extend the partial overtime exemption in Section 7(k) of the Act,

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1 Louisiana fire protection districts are empowered to incur contractual obligations. La.R.S. 40:1500(c). In this case, the District acted through its governing body, the Parish Council, to contract with the corporation.

2 In a footnote to its per curiam denial of rehearing, the panel noted that the district court's "finding" that the corporation was organized by the Parish was not attacked on appeal. The panel reaction to this contention ignores well settled law that all decisions on summary judgment motions are subject to de novo review. *Impossible Electronic Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1030 (5th Cir. 1982). All parties concede that Jefferson Parish did not "organize" the corporation. Wilcox did argue such before the panel.

created solely for firefighting and law enforcement activities engaged in by governmental agencies, to many employees of private volunteer fire companies, which though distinct and separate from the government, may provide services to the government. If allowed to stand, the decision would lead to the diminution of benefits to employees of other private entities that provide services to the public which under the Fifth Circuit's analysis may be able to stake a claim to the Act's "public sector" provisions.[3]

The decision rejects the litmus test applied by the Secretary of Labor in interpreting Section 3(x) and the applicable caselaw; that an entity's governing body must be appointed by the government or elected by the public in order to properly claim the status of a public agency. In its place, the Fifth Circuit employed a balancing test tilted heavily in favor of a private entity seeking to avail itself of the exception — in contradistinction to the well-recognized principles under the FLSA limiting attempts to deny the Act its fullest application. The Fifth Circuit has laid down a test which blurs the line between public and private agencies, creating uncertainty for employers and employees alike and making more difficult the Secretary's administration of the Act for many organizations operating like the corporation here.

The Fifth Circuit summarized the caselaw by announcing that "the key factors in determining whether a private party should be considered a public agency are

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[3] For example, the Act allows public employers to provide for compensatory time off in lieu of overtime pay, 29 U.S.C. §207(o), and establishes special provisions available to public employers regarding the use of volunteers, 29 U.S.C. §203(e), and the payment of overtime under certain circumstances, 29 U.S.C. §207(p).

whether the entity is directly responsible to the public officials or the general public and wheather the parties' contracts designate them as state agencies rather than independent contractors." A-5. The Secretary of Labor herself cited this as the controlling principle for classifying an organization as falling within or without the definition of a public agency.[4] The Secretary and Wilcox agreed with the panel's reliance on *Powell v. Tucson Air Museum Foundation of Pima County,* 771 F.2d 1309, 1311-12 (9th cir. 1985), *Skills Development Services, Inc. v. Donovan,* 728 F.2d 294 (6th Cir. 1984), and *Williams v. Eastside Mental Health Center, Inc.,* 669 F.2d 671 (11th Cir. 1982). These cases correctly define a public agency. The public accountability test used by these courts is derived from the National Labor Relations Board's use of such a test which was approved by this Court. See *NLRB v. Utility District of Hawkins County, Tennessee,* 402 U.S. 600, 604-5 (1971).

However, the Fifth Circuit has effectively repudiated *Hawkins County.* Under the test of "public accountability" reflected in the holdings of those cases, the corporation could not be a public agency. As those cases demonstrate, despite Parish control of many aspects of the operations of the corporation, without the ability to appoint or remove the corporation's board of directors, the corporation cannot qualify as a governmental entity.

The most detailed explanation of how the public accountability tests is applied to volunteer fire departments is found in *Conway v. Takoma Park Volunteer Fire Department, Inc.,* 666 F.Supp. 786 (D.Md. 1987), *appeal dismissed,* 838 F.2d 465 (4th Cir. 1988. The Fifth Circuit expressed

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[4] The Secretary filed amicus curiae briefs in connection with the original panel briefs and upon Wilcox's application for rehearing. She sought reversal of the district court's decision, and subsequently, the panel's decision.

its view that *Conway* was correctly decided, though noting that it presented a very different set of facts than those of the instant case. In terms of funding, accountability for the expenditure of government funds, and appointment and removal of the controlling boards, however, the facts in *Conway* are essentially the same as in the instant case. Since in *Conway* those facts were relied upon by that court to deny the Section 7(k) exemption to volunteer fire departments, the lower court's attempt to reconcile its holding with *Conway* is unpersuasive.

Significantly, the *Conway* decision tracks a ruling of the Wage and Hour Division of the Department of Labor that the volunteeer fire departments at issue were not public agencies because the "boards of directors of these corporations are not selected by public officials and do not serve as the pleasure of public officials." Opinion letter of the Deputy Administrator, Wage and Hour Division, Mar. 18, 1986, 4 (reproduced in the Appendix of this Petition, App. D, A-16). The opinion letter and *Conway* each address the "public agency" status of several volunteer fire departments in Montgomery County, Maryland. Of the several departments asserting that they were public agencies, the Labor Departament opined that only a few were public entities within the meaning of the Act, "those [departments] where the boards of directors [are] directly elected by the public" or "contain a mixture of elected and publicly appointed officials." Opinion Letter, A-16. In *Conway,* the court also considered the public power to select and remove the boards of directors as the controlling consideration in denying "public agency" status to the fire departments. The court determined that such status was available only to entities whose boards of directors are "selected by government officials or the general electorate." 666 F.Supp. at 794. *Conway* is cited here not as a particularly weighty decision in this area of the law, but as an object

lesson of the deference to be accorded the Secretary's enforcement decision in this complex field of employment relations.

Absent from the Fifth Circuit's decision is any discussion of the Opinion Letter or reference to 29 C.F.R. 553.202. That regulation states:

> The application of section [ ]. . .7(k), by [its] terms, is limited to public agencies, and does not apply to any private organization engaged in furnishing fire protection. . .services. This is so even if the services are provided under contract with a public agency.

Section 553.202, the Opinion Letter and *Conway* are all consistent with the legislative history of the 1974 amendments to the FLSA extending generally the Act's coverage for the first time to federal, state, and local governments. During the passage of these amendments, it was explained that the addition of the "public agency" provision was designed solely to cover "government employees at all levels of government" (S. Rep. 690, 93d Cong., 2d Sess. 22, 24 (1974)); the purpose of the amendments likewise was described as the means to extend coverage to the "public sector" and to "government employees." H.R. Rep. 913, 93d Cong., 2d Sess. 27, *reprinted in* 1974 U.S. Code Cong. & Admin. News 2837. Nowhere is there any suggestion that these amendments were intended to encompass entities, such as the private corporation here, which merely provide services under contract to the government, even though subject to the often special contractual control retained by the government. While this corporation, when viewed by the functional service it provides and the source of and restrictions on its funding, may resemble to some extent an agency of Jeffer-

son Parish, Louisiana, when its accountability to the public is properly considered, the corporation should be seen as a private entity merely providing services to the government. As such, the corporation loses its claim to the provisions of the FLSA unique to governmental employment. It simply makes no sense to endow this corporation with public sector status when it enjoys no similar status under any other federal or state law.

The Fifth Circuit's failure to even discuss, never mind to follow, the Secretary's interpretation of the "public agency" provision of the Act, is particularly surprising given the Fifth Circuit's typical willingness to accord great weight to the Secretary's interpretations under the FLSA. *See e.g., Dole v. Petroleum Treaters, Inc.,* 876 F.2d 518 (5th Cir. 1989). Moreover, the Court's decision is at odds with the historic doctrines that the FLSA should be construed liberally in favor of extending its benefits to workers, *See e.g., Alamo v. Secretary of Labor,* 471 U.S. 290, 296 (1985), and that exemptions from the Act's requirements are to be narrowly drawn. *See e.g., Dole v. Petroleum Treaters, Inc., supra.* The Court's apparent disregard of these principles provides an additional basis for this Court's consideration of the issues posed by the instant case; otherwise the uniformity of the Secretary's enforcement policies, and concomitant expectancies of minimum wage and overtime rights of employees, is at risk.

The Fifth Circuit's decision is flawed not only by its departure from the public accountability test but also by the framework it would substitute. The "traditional governmental function" test, which the Fifth Circuit utilizes to shore up its conclusion, embraces a principle which the Court has abandoned. This approach, established in *National League of Cities v. Usery,* 426 U.S. 833 (1976),

was abandoned by the Supreme Court in *Garcia v. SAMTA*, 469 U.S. 528 (1985). There, the Court recognized that an attempt to establish a traditional/nontraditional dichotomy was an unworkable method for determining which functions are covered by the FLSA. The Fifth Circuit's resuscitation of this discarded concept is curious at best and chaotic to labor relations policies at worst.

The Fifth Circuit's focus upon an entity's source of funding and the constraints that may be imposed on the expenditure of such funds is simply unworkable. Governmental funding and accountability of the entity for those funds was specifically rejected in *Powell*, *Skills Development*, and *Williams*, *supra*, as a basis for defining a public agency. *Hawkins County*, does not designate such factors as controlling. Since organizations that would seek to embrace the public agency exceptions under the FLSA are those whose funding and existence are substantially dependent upon government funds (with the restrictions and oversight that customarily attach to the use of public funds), the effect of the court's decision, if it stands, will be to extend the benefits of the Act's unique exemptions for governmental employment to purely private organizations. Moreover, because the degree of government funding and accompanying controls will vary greatly by jurisdiction, a focus on this factor will undeniably impede the effective administration of the Act. Not only will the Secretary's responsibilities be impacted by the introduction of this fluid and ill-defined standard, but employers and employees will be denied a reliable means of determining their obligations and benefits. The *Hawkins County* test of public accountability, on the other hand, provides a clear determiner. The manner by which an entity's board of directors is selected is readily apparent.

Finally, the lower court's focus on the contractual

arrangement whereby the corporation is subject to the limited control of the Parish Council similarly fails to distinguish between governmental agencies and private entities doing business with the government. This approach allows contractual control to replace governmental control over the entity as the decisive factor in drawing the bounds of the public agency exception. The decision permits the corporation the benefit of the exception where true governmental control is absent, i.e., where the Parish or District lacks the authority to control the corporation by the power to select and remove the members of its governing body.[5]

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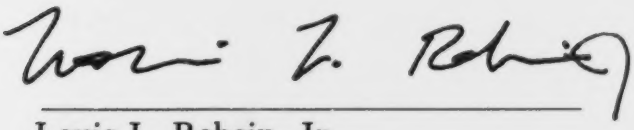
[5] Despite the Fifth Circuit's attention to the contract, its decision overlooks that the contract itself underscores the corporation's status as a *private* entity. In this regard the contract states that "in the event that Terrytown Fifth District Volunteer Fire Department, Inc. should become inactive or *be replaced by a fully paid department under Parish jurisdiction*. . ." all assets provided to the Company under the agreement remain within the Company. In other words, the contract recognizes that Terrytown in its present status is not under Parish jurisdiction.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Fifth Circuit Court of Appeals should be granted.

Respectfully submitted,



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APPENDIX A

William M. Wilcox, Jr.
Plaintiff-Appellant,

v.

TERRYTOWN FIFTH DISTRICT VOLUNTEER FIRE DEPARTMENT, INC.
Defendant-Appellee.

No. 89-3378.

United States Court of Appeals,
Fifth Circuit.

April 3, 1990.

Volunteer fire department employee filed suit seeking declaratory relief and back pay for overtime hours. The United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., entered summary judgment in favor of fire department, and employee appealed. The Court of Appeals, Gee, Circuit Judge, held that volunteer fire department was exempt from overtime requirements of Fair Labor Standards Act as "public agency" engaged in fire protection activities.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GEE, GARZA, and DAVIS, Circuit Judges.

Gee, Circuit Judge.

Today we decide the close and very difficult question whether the Terrytown Fifth District Volunteer Fire Department, Inc. is a "public agency" as that term is defined in the Fair Labor Standards Act, 29 U.S.C. §203(x). We determine that it is.

Facts and Prior Proceedings

William Wilcox is a full time employee of the Terrytown Volunteer Fire Department, Inc. ("Terrytown"), a non-profit corporation that provides for protection services to an unincorporated sector of Jefferson Parish, Louisiana. In 1985, Terrytown instituted workweek changes, paying overtime to operators who worked a 24-hour on, 48-hours off work cycle, but only after they had worked 212 hours in a 28-day cycle. Terrytown acted in the belief that it was a "public agency" exempt form the overtime requirements of the Fair Labor Standards Act.

In December, 1988, William Wilcox filed suit, seeking declaratory relief and back pay for all hours worked over forty in a workweek. Terrytown filed a motion for summary judgment, contending that as a "public agency" it was exempt from the overtime requirement. The district court granted Terrytown's motion. Wilcox appeals.

Discussion

1. Fair Labor Standards Act

After providing in §207(a) for a forty-hour work week and time and a half for excess hours, the Fair Labor Standards Act provides an exemption to the overtime pay requirements of § 207(a) for employees of *public agencies*

engaged in fire protection activities. 29 U.S.C. § 207(k). Under § 207(k), an employee who works a 24-hours on, 48-hours off work cycle—as did Wilcox—is entitled to overtime pay only after working 216 hours (or some lesser amount if, as determined by the Secretary pursuant to § 6(c)(3), the average number of hours worked by employees engaged in such activities is less than 216 in a 28 day cycle.

Public agency is defined, in section 3(x) of the Fair Labor Standards Act, as follows:

> (x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

29 U.S.C. § 203(x).

Unfortunately, a simple reading of section 3(x) of the FLSA does not answer the question of, "What is a public agency?" Being less than a model of statutory drafting, section 3(x) includes in its definition of public agency several categories of entities. The difficulty comes in determining what (and how many) those categories are. We set forth the statutory framework here in outline form so as to simplify that task.

"Public agency" means'

[1.] the Government of the United States;

[2.] the government of
  [a] a State or
  [b] political subdivision [of a state];
  or

[3.] any agency of

[a] the United States ...,

[b] a State, or

[c] a political subdivision of a State;

or

[4.] any interstate governmental agency.

When the section is viewed in this light, it becomes clear that the relevant inquiry here is whether the Terrytown Fifth District Volunteer Fire Department, Inc. is an "agency of a political subdivision of a State." (Section 3.c of our outline).[1] More specifically, is the Terrytown Fifth District Volunteer Fire Department, Inc. an agency of Jefferson Parish, Louisiana?[2]

3. Terrytown is a "public agency"

Terrytown argues, and the district court ruled, that Terrytown meets the definition of public agency because it is an "agency of a political subdivision." We hold, not only that the district court made the proper inquiry, but that it reached the proper result. First, the result on its face,

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[1] There is no dispute that Terrytown falls within none of the other listed categories. Rather, the primary dispute has been whether the narrowest category provided for in section 3(x) is "political subdivision of a State" or "*agency of* a political subdivision of a State" (emphasis added). A careful reading of section 3(x) leads us to the conclusion that the legislature intended to include in its definition a "public agency," any agency of a political subdivision of a State.

[2] Once again there is no dispute that Louisiana is a state and that Jefferson Parish is a political subdivision of a State.

appears patently correct. A fire department is, in a sense, the archtypical public agency; further, it is exactly the type of agency to which § 207(k) is specifically directed. (Section 207(k) is entitled "Employment by public agency engaged in fire protection or law enforcement activities.")[3]

Second, and on somewhat stronger footing, the facts of this case lead us to conclude that Terrytown is a public agency. We have no doubt that Terrytown is, as the district court found, an agency of Jefferson Parish, Louisiana. The district court's analysis is sound and we borrow here from its well-written and well-reasoned opinion.

[1] The key factors in determining whether a private party should be considered a public agency are whether the entity is directly responsible to public officials or to the general public and whether the parties' contracts designate them as state agencies rather than independent contractors. *Powell v. Tucson Air Museum Foundation of Pima County*, 771 F.2d 1309, 1311-12 (9th Cir. 1985), citing *Skills Development Services, Inc. v. Donovan*, 728 F.2d 294 (6th Cir. 1984) and *Williams v. Eastside Mental Health Center, Inc.*, 669 F.2d 671 (11th Cir. 1982).

[2] As the district court found, the defendant Fire Department is an agency of a political subdivision of the state.

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[3] We note that a federal district court in Maryland has held, and in the case before it we believe properly so, that 15 of the 18 fire and rescue corporations then providing services in Montgomery County were not public agencies entitled to take advantage of the § 207(k) exemption to overtime payment. *Conway v. Takoma Park Volunteer Fire Dept., Inc.*, 666 F.Supp. 786 (D.Md.1987), *appeal dismissed*, 838 F.2d 465 (4th Cir. 1988). As the Conway court stated, "the § 207(k) exemption does not apply to an employee merely because he or she is engaged in fire protection activities." *Id.* at 792. We do not here hold otherwise. We are, however, faced with a very different set of facts, which call for a result here different from that reached in *Conway*.

The defendant Fire Department is a non-profit Louisiana corporation that was organized by Jefferson Parish to deliver to the citizens of Terrytown fire fighting and fire protection services, which services have, as we note above, been specifically delineated as traditional governmental functions by the courts. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (rev'd on other grounds); *see San Antonio Metropolitan Transit Authority v. McLaughlin*, 876 F.2d 441 (5th Cir. 1989).

In addition, the Fire Department is funded almost exclusively by the proceeds of a millage tax imposed upon Jefferson Parish residents and by allocation of certain state tax dollars. La.R.S. 22:1585. The Fire Department remains accountable to Jefferson parish for the way in which such money is spent and can use these funds only to provide fire protection and related services that are necessary for the operation of the department. It must submit annual financial reports to the financial director of Jefferson Parish detailing how all public funds received by it were disbused. In addition, the department must submit to the Parish its annual budget for fire protection services one year in advance, so that the Parish may budget for these costs.

The Fire Department performs its firefighting services pursuant to an agreement between it and Fire Protection District No. 5. The contract specifically provides that the governing authority of the Fire Protection District No. 5 is the Jefferson Parish Council. Under the terms of the contract, the Fire Department must comply with all reasonable recommendations made by the agencies appointed by the Parish Council, (Jefferson Parish Department of Fire and Emergency Services and The Property Insurance Association of Louisiana), or it must show cause at a hearing held before the Jefferson Parish Council why

it cannot. Although the Jefferson Parish Council does not directly control the daily activities of the Fire Department, it is clear from the contractual agreement that the Council has the ultimate power and authority over the activities of the Fire Department.

After analyzing the facts of this case in conjunction with the factors set forth above, we are convinced that Terrytown is an agency of a political subdivision of the State of Louisiana and that the judgment of the district court is correct. The Terrytown Fifth District Volunteer Fire Department, falls within the exemption set forth in 29 U.S.C. § 207(k).

The judgment of the district court is AFFIRMED.

APPENDIX B

William M. Wilcox, Jr.
Plaintiff-Appellant,

v.

TERRYTOWN FIFTH DISTRICT VOLUNTEER FIRE DEPARTMENT, INC.
Defendant-Appellee.

No. 89-3378.

United States Court of Appeals,
Fifth Circuit.

May 21, 1990.

Appeal from the United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, Judge.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 3, 1990, 5th Cir., 1990, 897 F.2d 765)

Before GEE, GARZA, and DAVIS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED; and, no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure

and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

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[1] Appellant's Suggestion of Reconsideration En Banc (p.2) and Petition for (panel) Rehearing (p.1) both assert factual error in the opinion's statement (at p. 767) that "[t]he defendant Fire Department ... was organized by Jefferson Parish to deliver ... fire fighting and fire protection services...." The statement is, however, a direct quote from a factual finding by the trial court—one which was not attacked as incorrect, let alone as clearly erroneous, on the appeal to us.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
July 31, 1989

WILLIAM M. WILCOX, JR. — CIVIL ACTION

VERSUS — NUMBER 80-5473

TERRYTOWN FIFTH DISTRICT VOLUNTEER FIRE DEPARTMENT, INC. — SECTION L (2)

This matter was submitted to the Court on a former date. After considering the record, the memoranda submitted and oral arguments of counsel, as well as the applicable law, this Court GRANTED summary judgment in favor of defendant, Terrytown Fifth District Volunteer Fire Department, Inc. The Court now issues its reasons for its decision.

Plaintiff, William Wilcox, is one of nineteen paid employees of the Terrytown Fifth District Volunteer Fire Department, Inc. ("Fire Department"), a non-profit Louisiana Corporation incorporated in 1961. He filed this suit alleging that the Fire Department is a private corporation and as such it violated the Fair Labor Standards Act ("FLSA" or the "Act"), 29 U.S.C. § 201 *.et seq.*, by failing to pay overtime compensation as required by § 207(a) of the Act. The sole issue before this Court is whether the Fire Department is entitled to avail itself of the exemption set forth in § 207(k) of the Act.

Section 207(k) of the Act exempts public agencies engaged in fire protection activities from the application of

DATE OF ENTRY JULY 3 1989

overtime compensation requirements for employment. In particular, section 207(k) provides:

> No public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of any employee in fire protection activities...

In order to determine whether the defendant is entitled to such an exemption, it must first be determined whether the Fire Department is a "public agency" within the meaning of the Act.

29 U.S.C. § 203(x) of the Act defines public agency as:

> ...the Government of the United States; the government of a state or political subdivision thereof; any agency of the United States ..., a State, or a political subdivision of a State; or any interstate governmental agency.

The Fire Department admits that it is not a political subdivision of the State of Louisiana. Rather, it asserts that it should be viewed as an "'agency of a political subdivision" of the State of Louisiana. The Act does not provide a definition of "agency," however, contrary to plaintiff's position, it is clear from the definition contained in the act itself that an "agency of a political subdivision" does not include only those entities which meet the criteria of "political subdivision". If Congress had intended such a narrow interpretation, it would not have included both phrases in its definition of public agency. See 29 U.S.C. § 203(x).

The key factors in determining whether a private party should be considered a public agency are whether the

entity is directly responsible to public officials or the general public and whether the parties' contracts designated them as independent contractors rather than state agencies. *Powell v. Tucson Air Museum Foundation of PIMA,* 771 F.2d 1309 (9th Cir. 1985), citing *Skills Development Services, Inc. v. Donovan,* 728 F.2d 294 (6th Cir. 1984) and *Williams v. Eastside Mental Health Center, Inc.,* 669 F.2d 671 (11th Cir. 1982).

The Court finds that the defendant Fire Department is an agency of a political subdivision of the state. State agencies, although not tantamount to the state itself, are instrumentalities of the state which are necessary to implement state policies. *Fuchs v. Rural Electric Convenience Co-op Inc.,* 771 F.2d 1309 (9th Cir. 1985).

The defendant Fire Department is a non-profit Louisiana corporation that was organized by Jefferson Parish to deliver to the citizens of Terrytown fire fighting and fire protection services, which services have been specifically delineated as traditional governmental functions by the courts. *National League of Cities v. Usery,* 426 U.S. 833, 96 S.Ct. 2465 (1976) (rev'd on other grounds); *San Antonio Metropolitan Transit Authority v. McLaughlin,* ____F.2d____ (5th Cir. 1989), No. 88-5550, (1989 U.S. App. LEXIS 9341). In addition, the Fire Department is funded almost *exclusively* by the proceeds of a milage imposed upon Jefferson Parish residents and by allocation of certain state tax dollars. La.R.S. 22:1585. The Fire Department remains accountable to Jefferson Parish for the way in which such money is spent and can only use these funds to provide fire protection and related services which are necessary for the operation of the department. It must submit annual financial reports to the financial director of Jefferson Parish showing the disbursements of all public funds received. In addition, the department must submit to

the Parish its annual budget for fire protection services one year in advance so that the Parish may include these costs for budgetary purposes.

The Fire Department performs its fire-fighting services pursuant to an agreement between it and Fire Protection District No. 5. The contract specifically provides that the governing authority for the Fire Protection District No. 5 is the Jefferson Parish Council. Under the terms of the contract, the Fire Department must comply with all reasonable recommendations made by the agencies appointed by the Parish Council, (Jefferson Parish Department of Fire and Emergency Services and The Property Insurance Association of Louisiana), or it must show cause at a hearing held before the Jefferson Parish Council why it cannot. Although the Jefferson Parish Council does not directly control the daily activities of the Fire Department, it is clear from the contractual agreement that the Council has the ultimate power and authority over the activities of the Fire Department.

In addition to the factors set forth in *Powell, supra,* the court in *Enrique Molina-Estada v. Puerto Rico Highway Authority,* 680 F.2d 841 (1st Cir. 1982) set out a five-prong test for determining whether a private corporation is an agency of a public subdivision. That test includes analyzing various factors such as whether the activity benefits the community as a whole, whether the service was made available to the public at little or no expense, whether the service was undertaken for the purpose of public service rather than profit, whether the government was its principal provider, and whether the government was particularly well-suited to provide the service or activity because of a community-wide need for it. *Id.* at 844.

Fire protection is a public or governmental function

by nature which would have to be performed by the Government but for the activities of volunteer fire department. *Janusaitis v. Middleberry Volunteer Fire,* 607 F.2d 17 (2d Cir. 1979), quoting *Perez v. Sugarman,* 499 F.2d 761 (2d Cir. 1974), (relating to a child-care institution). Thus, fire protection is traditionally a service provided by the government which clearly benefits the community as a whole. The Fire Department at issue is a Louisiana non-profit corporation which has as its exclusive purpose the delivery of fire protection services, Article II(A) of the Articles of Incorporation for the Fire Department provide that the purpose of the corporation shall be:

> To maintain a volunteer fire fighting department and equipment; to promote and maintain other related activities and facilities; to promote good fellowship among its members, and those having a common interest in the welfare of the community; to promote social and physical exercise of its members and of the community.

In *Janusaitis* the court stated:

> [T]he provision of fire protection is even more clearly an attribute of sovereignty than the provision of care for the neglected children, since in the latter case the government substitutes its own services for those which are generally private. Yet in *Perex,* we found that a child-care institute performed a public function. The government's interest in fire safety is at least as compelling as its interest in "educating the public," an interest held sufficient by the Third Circuit to support treating a library as an instrumentality of the state. *Janusaitis, supra.*

The Second Circuit further held in *Janusaitis* that the actions of a private corporation which provided fire protection services were state action for purposes of the First Amendment. The court phrased its inquiry as follows:

> [w]hether fire protection is a function so traditionally associated with sovereignty that its performance, even by an otherwise "private entity", constitutes state action. We find that it is such a function. *Id.* at 22.

Under the facts of this case, it is clear that the Fire Department is performing activities which have been historically performed by the government. Fire protection is a function so traditionally associated with sovereignty that its performance even by a volunteer organization, constitutes state action. *Liben v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn.1985). Therefore, it is the judgment of this Court that defendant Fire Department is an agency of a political subdivision of the State of Louisiana, the Fire Protection District No. 5, and thus falls within the exemption set forth in 29 U.S.C. § 207(k).

New Orleans, this 28th day of July, 1989.

/s/ Veronica D. Wicker
UNITED STATES DISTRICT JUDGE

APPENDIX D

Bruce P. Sherman, Esquire
Senior Assistant County Attorney
Office of County Attorney
101 Monroe Street
Rockville, Maryland 20850

Dear Mr. Sherman:

This is in response to your letter of October 31, 1985, requesting our opinion as to whether employees of the fire and rescue departments in Montgomery County, Maryland (the County) are employees of a "public agency" within the meaning of section 3(x) of the Fair Labor Standards Act (FLSA) so that the limited overtime pay exception provided in section 7(k) of FLSA may be applied to such employees. In addition to the information provided with your letter, you furnished Mr. Leif Jorgenson, Office of the Solicitor, with suppplemental information in your letters of January 14 and 21, 1986.

The fire and rescue services in the County have both public and private characteristics, and we believe it will be useful to set out pertinent factual and background information about the operations in question as we understand them.

The County has a Department of Fire and Rescue Services (DFRS) which corresponds to the more typical fire departments of local governments, and DFRS clearly is a public agency as part of the Montgomery County Government; its status is not at issue here. The DFRS employs fire inspectors, arson investigators, various administrative personnel, and is responsible for all of the communication in the County for dispatching emergency apparatus, but does not operate any of the equipment itself.

The County has chosen to have actual fire fighting and rescue operations performed by sixteen independent fire corporations and two rescue corporations under explicit authority from the State. Md. Ann. Code, Art. 25, section 3(m).[1]

These entities are nonprofit corporations organized under Maryland law and controlled in their day-to-day operations by their individual boards of directors. These corporations were formed by citizens concerned with fire protection at various times in the past before extensive involvement in fire protection by the County, which has expanded its role over the years.

The fire corporations use the services of both paid employees and volunteers, the percentage of each varying in each coproration, depending on the availability of volunteers. Under the County Code and regulations, paid employees of the corporations must be hired by the corporation pursuant to the County's civil service rules, and all personnel actions involving paid employees are subject to review and approval bay the County personnel office. In addition, the civil service employees have grievance and appeal rights of adverse actions to the County's merit system protection board. The civil service positions in the fire corporations and in DFRS all use the same classifications, and all employees in the same classification receive the same training. All employees of the same classification are eligible and do in fact compete for promotions in both DFRS and the corporations, and the employees move freely among these various organizations, depending on vacancies.

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[1] A bill was proposed by the County Executive in 1979 which would have totally centralized fire and rescue services under a single fire chief appointed by the County Executive. The bill was rejected by the County Council in favor of continued reliance on the fire corporations.

All the corporations are supported by tax funds and all the civil service employees are paid directly by the County and receive civil service retirement and disability benefits. All fire fighting and rescue apparatus and facilities purchased by the fire corporations with County tax funds after 1980 are owned by the County and are assigned in accordance with the County's Master Fire Defense Plan. Under the County Code, approval of the County Council is necessary for the organization and location of a fire or rescue corporation in the County, and Council approval is required to change their locations.

Under section 3(x) of FLSA, public agency means "the government of a State or political subdivision thereof . . . ." In applying the term "political subdivision" to various activities in the past, the Department of Labor has relied on the case of *NLRB v. Natural Gas Utility District of Hawkins County Tennessee*, (*Hawkins County*), 402 U.S. 600 (1971), which defined the term 'political subdivision" of a State as used in the National Labor Relations Act. The Supreme Court accepted the NLRB's definition of political subdivisions as entities "that are either (1) created directly by the (S)tate, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-5.

The *Hawkins County* criteria for determining a political subdivision of a State were employed by the courts in Williams v. Eastside Mental Health Center (*Eastside*), 669 F.2d 671 (11th Cir. 1982), and *Skills Development Services v. Donovan* (*Skills Development*), 728 F.2d 294 (6th Cir. 1984), to define the term "political subdivision" in section 3(x) of FLSA. The *Eastside* court found governmental control and financing of the entity in question, but held that while there existed controls "perhaps uncommon in the

context of normal private corporations contracting with the (S)tates . . . ., " the key factor is the authority of a public official to hire and fire the governing board of directors. 669 F.2d at 679. Similarly, the court in *Skills Development* indicated that governmental involvement with the corporation does not make it an arm of the State:

> Although (S)tate officials doubtless encouraged the organization of private groups such as the Contractors, private citizens apparently created these associations, before 1973 when the (S)tate formally adopted a plan to use private groups to provide services to the mentally retarded. Moreover, the administrators of the Contractors are not responsible to public officials or the general electorate who cannot fire nor recall the administrators. Courts employing this element of the political subdivision test look for an ability by public officials or the general public to remove an offending administrator. 728 F.2d at 300.

A recent case further demonstrates that extensive governmental involvement with a corporation performing a governmental function does not render that corporation a public agency within the meaning of FLSA. In *Powell v. Tucson Air Museum Foundation of Pima County* (*Powell*), 771 F.2d 1309 (9th Cir. 1985), employees sought to have their employer declared a public agency, as that was the only basis upon which FLSA coverage could be asserted. The employer was a nonprofit corporation which had an agreement with a local government to lease real property from the government and operate a museum on it. The government had the power to approve admission fees, concessionaires, hours of operation, and improvements to the property. The government controlled how the corporation spent its money and could specify the accounting methods to be used by the corporation, and required the corporation

to submit an annual budget and to open its books for inspection and audit. The government also furnished two full-time government employees to the corporation. Despite this extensive involvement by the local government, the court held that the corporation was not a public agency, citing as the key factors whether the entity is directly responsible to public officials or to the general public and whether the parties' contracts designated them as independent contractors, not State agencies.

When we apply these tests to the Montgomery County fire corporations, we find that the results vary. For three of the corporations, the County Code requires that the boards of directors be directly elected by the public or requires that they contain a mixture of elected and publicly appointed officials. The County's decision to mandate the makeup of the boards of directors of these corporations in this way is apparently based on local political considerations, but no matter what the reason for the decision to establish public control of there corporations, such control makes them public agencies within the criteria of *Skills Development, Eastside,* and *Powell.*

The boards of directors of the remaining corporations are selected by and from the volunteer members of the corporations, and public officials have no legal authority over the appointment and removal of these boards of directors. In certain respects, however, their relationship with the Montgomery County Government gives them the appearance of a governmental entity. Governmental financing and the facts that the paid employees are subject to the County's civil service system and that their employment is regulated by the County's personnel office may be viewed as characteristics of governmental status. The employment condition of the paid employees is indistinguishable from that of the employees of DFRS, which is unquestionably

part of the County. County tax funds pay all of the employees and generally fund the operations of the fire corporations. It would seem that through financial support and control of the employees of the corporations, the County has a substantial measure of control over the corporations. On the other hand, the boards of directors of these corporations are not selected by public officials and do not serve at the pleasure of public officials. Under *Skills Development, Eastside,* and *Powell,* these organizations would not be considered to be public agencies due to lack of public control over the boards of directors. *Eastside* and *Skills Development* make it clear that governmental funding of an entity, standing alone, does not render that entity a political subdivision of a State. Nor does substantial State regulation create a political subdivision, e.g., State licensing requirements for privately-owned liquor stores.

Montgomery County relies chiefly on control of the fire corporations' budgets and the presence of governmental employees on the corporations' payrolls as indicating that the corporations are public agencies, but in the *Powell* case the court did not find these factors controlling.

We note also that the County code provides with respect to the employees of the corporations:

> (g) Limitations. Nothing in this subtitle shall be construed to mean that any employees of the local corporations are (C)ounty employees either on a de jure or de facto basis nor that the (C)ounty government shall have authority over: (1) Who is employed; (2) who is terminated; (3) duty assignments; and (4) day-to-day super-vision. Further, this chapter shall be construed to effectuate its intent that career personnel employed by local corporations and paid with tax funds are not (C)ounty employees and that the local cor-

> porations shall remain autonomous and independent corporate entities. The provisions of this section shall not be construed to diminish the authority of (C)ounty government to act in emergency situations pursuant to the provisions of section 21-4J and 21-4K. County Code, section 21-4M(g).[2]

While this disclaimer of an employment relationship between the County and the employees is not dispositive of the issue of the status of the corporations, it is a factor to be considered. Also, a State circuit court in *Hardy, et al. v. Montgomery County, Maryland, et al.*, Equity No. 53669, Montgomery County Circuit court, October 7, 1980, found that the employees of the fire corporation were not County employees, although the court went on to hold that because they were comparable to County employees they should have the same exempt status from the wage and hour law of the State of Maryland.

But, as indicated above from the discussion of *Eastside, Skills Development,* and *Powell,* the single most determinative factor is the control of the appointment and termination of the corporations' boards of directors. From the information available to us it appears that the boards of directors in this latter group of corporations are not subject to appointment or dismissal by an elected official or an official who is responsible to an elected official. While the basis for this form of organization of the County's fire and rescue services may be largely historical and political, this does not appear to be a sufficient basis for distinguishing *Eastside, Skills Development,* or *Powell* so as to conclude

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[2] The disclaimer is technically not entirely accurate, as the County does have authority over who is hired and fired through the county civil service and adverse action appeal process.

that the corporations qualify as political subdivisions of Montgomery County. We recognize the apparent anomaly which results from this analysis, i.e., that the governmental status of a particular Montgomery County fire or rescue corporation will turn on what form of organization it chooses to adopt.

Based upon the foregoing analysis, only those corporations whose boards of directors are subject to public control would be considered public agencies within the meaning of section 3(x) and, therefore, able to avail themselves of the limited overtime pay exception provided in section 7(k) of FLSA.

Section 7(k) of FLSA provides a partial overtime pay exemption for public agency employees employed in fire protection or law enforcement activities (including security personnel in correctional institutions). Under this provision, an employer may establish a work period of 7 to 28 consecutive days for the purpose of paying overtime pay to employees employed in fire protection or law enforcement activities. The maximum hours standard for fire protection personnel ranges from 53 hours worked in a 7-day work period to 212 hours worked in a 28-day work period. The provisions of FLSA as they apply to fire protection and law enforcement employees of public agencies are set forth in Regulations, 29 CFR Parta 553 (copy enclosed).

Those corporations not subject to public control would not be public agencies; consequently their otherwise covered and nonexempt employees would have to be furnished overtime compensation after 40 hours in a workweek.

The Fair Labor Standards Amendments of 1985 (Public Law 99-150), which were enacted on November 13, 1985, change certain provisions of FLSA as they relate to

employees of State and local governments. The Fair Labor Standards Amendments of 1985 (the Amendments) will become effective on April 15, 1986. the Departament of Labor (the Department) intends to issue regulations as may be required to implement this legislation. A summary of the Department's investigation policy are enclosed for your information.

We trust that the above discussion satisfactorily responds to your inquiry. Please let us know if you have any further questions.

Sincerely,

/s/ Illegible

Herbert J. Cohen
Deputy Administrator

Enclosures